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From: Xidis, Claire  
Sent: Monday, March 23, 2009 5:51 PM  
To: 'Ehrich, Delmar R.'  
Cc: Jorgensen, Jay T.; George, Robert; John Elrod; John Tucker; Theresa Noble Hill; Louis Bullock; David Page; David Riggs; Woody Bassett; James Graves; rsanders@youngwilliams.com; Deihl, Colin C.; Triplett, Eric J.; Jones, Tim; Baker, Fred; Moll, Ingrid; 'Kelly.Burch@oag.ok.gov'; 'Trevor.Hammons@oag.ok.gov'; 'Daniel.Lennington@oag.ok.gov'; 'Bob Nance'; 'David Riggs'; 'David Page'; 'Richard Garren'; 'bblakemore@bullock-blakemore.com'; 'Louis Bullock'; 'Sharon Gentry'  
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Delmar -

It appears we have finally reached an agreement on the State's request for an extension of time to take the Defendants' damages experts that are disclosed on March 31st. We will be filing an unopposed motion with the Court for an extension to May 15, 2009.

As for the other issues raised in your email, we created and sent the list of lead authors in a good faith effort to work through Defendants' complaints.

We have offered multiple dates for each expert prior to the discovery deadline, including the most recent offers for Krosnick and Bishop, which were before the discovery cut-off. Thus, it is clearly not these experts' schedules that are preventing Defendants from taking their depositions within the discovery period.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]  
Sent: Monday, March 23, 2009 5:09 PM  
To: Xidis, Claire  
Cc: Jorgensen, Jay T.; George, Robert; John Elrod; John Tucker; Theresa Noble Hill; Louis Bullock; David Page; David Riggs; Woody Bassett; James Graves; rsanders@youngwilliams.com; Deihl, Colin C.; Triplett, Eric J.; Jones, Tim  
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Claire--

However much the plaintiff may wish it otherwise, these schedule and disclosure issues are linked.

The plaintiff's disclosures as to its damages reports are plainly deficient under Rule 26 because the plaintiff has not disclosed the opinions of each expert the plaintiff may call to testify at trial. Even the list you sent to me today of "lead authors" is insufficient because it does not disclose the opinions about which each will testify. Some chapters list as many as six "lead authors." By my count, at least five are listed as lead authors for the key last chapter on the estimation of the natural resource damages claimed by plaintiff. If plaintiff intends to call each to testify as to the whole chapter, or the entire report, any expert after the first will be excluded as duplicative. Because this outcome can be so easily foreseen, I conclude that the plaintiff, instead, wants to call each expert to testify to a portion of the report, a building block approach, if you will. The report itself, and your list, fail to disclose the specific, limited opinions to which each might, in his or her turn, testify.

In short, plaintiff is engage in a "hide the testifying expert" game.

Applicable precedent make clear that a defective Rule 26(a) expert disclosure can not be cured by offering the purported experts

for their depositions.

Plaintiff's offering these seven purported testifying experts for their depositions does not cure the defective disclosure. The plaintiff is trying to put the defendants in the position of having to take seven depositions, not all of which may need to have been taken, if plaintiff had made the proper disclosures.

That the parties now find themselves trying to schedule depositions before April 16 is entirely a function of plaintiff's lack of regard for Rule 26.

In short, we will bring move the court to strike the plaintiff's damages report or, in the alternative, for a complete disclosure, followed by such depositions as may be necessary. We will seek to have the motion heard on an expedited basis prior to the first deposition (Chapman, on April 6)

We accept the offered deposition dates, therefore, for Chapman (4/6), Tourangeau (4/8), Morey (4/10), Haneman (4/15) and Kanninen (4/16).

As to Bishop and Krosnick, I ask that you find dates after April 16, if necessary. We are down to the discovery wire because plaintiff has failed to make the proper disclosures. Further, I have indicated to you that we can accommodate any work day between April 1 and 16. I recognize that your experts are busy people, but it is their schedules, not mine, that cause these last two depositions to need to be scheduled out of time.

I think the Magistrate Judge will be sympathetic to our application to do so, if plaintiff refuses.

Finally, we our agreeable to plaintiff's taking out of time the depositions of the experts disclosed by defendant on March 31. We suggest a deadline of May 15, but could likely accommodate earlier dates.

I suspect the Magistrate Judge will note the lack of comity on the part of the plaintiff.

If you have any questions, please contact me.

Del

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From: Xidis, Claire [mailto:cxidis@motleyrice.com]  
Sent: Monday, March 23, 2009 13:17  
To: Ehrich, Delmar R.  
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Delmar -

As I explained during our conversation on Friday, we must untie these issues from each other and figure out where we stand on each of them today.

Issue #1 - Free of conditions and contingencies, do Defendants agree to an extension to May 15, 2009 for the State to take the depositions of the Defendants' damages experts disclosed on March 31st? I need a simple yes or no on this by 5 pm Eastern today. After 5 pm, we will either file an opposed or unopposed motion on this issue depending on your response.

Issue #2 - Are Defendants accepting or declining the offered deposition dates as follows? I need a simple yes or no today, as I had requested a final answer days ago.

- April 6 - Chapman
- April 8 - Tourangeau
- April 10 - Morey
- April 15 - Hanemann
- April 16 - Kanninen

Issue #3 - To the extent Defendants are now requesting an extension of time to take the depositions of Krosnick and Bishop to May 15th, the State cannot make this agreement. To quote your colleague, John Elrod: "Suck it up and work on a Saturday." The State recently agreed to send a lawyer to Baton Rouge to take a Saturday deposition in order to get it done before the discovery cut-off. It is crunch time to get discovery done. I can't see any reason why you would not go ahead and take Bishop on the 11th since you will be in Tulsa anyway on the 10th. By the time we get to the discovery cut-off, Defendants will have had three and a half months to get these depositions done, and multiple offers of dates. We just can't keep stringing this out. As for Krosnick, his availability is extremely limited, so if you want to depose him, I strongly recommend you take his deposition as offered on March 27th.

I am at my desk if you want to discuss this further.

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From: Ehrich, Delmar R. [<mailto:DEhrich@faegre.com>]  
Sent: Monday, March 23, 2009 12:10 PM  
To: Xidis, Claire  
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Claire, I have a brief meeting at 11. To move things along, I agree on behalf of the defendants that the plaintiff may take the depositions out of time of any damages expert disclosed on March 3. In exchange, and subject to our working out an appropriate disclosure, we will accept five of the seven deposition dates offered, and the other two (Bishop and Krosnick) if taken, may be taken out of time. (We accept Chapman on the 6th.) We'd like until April 30 to take the latter two depositions. Defendants are agreeable to plaintiff's completing the damages depositions by May 15.

Let's talk further about the list, Claire. It is a good start, but there is still no representation about which witness will testify as to what if called at trial. An example: are you really going to call five witnesses at trial as to Chapter 7. If so, they are duplicative.

I can likely call you in about 30 minutes.

Del

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From: Xidis, Claire [<mailto:cxidis@motleyrice.com>]  
Sent: Monday, March 23, 2009 10:30  
To: Ehrich, Delmar R.  
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Delmar -

I am running late too. 11:00 Central would be better for me.

During our conversation on Friday evening, you agreed that you would let me know by noon EST today whether Defendants agree to the 29-day extension for the depositions of Defendants' damages experts that are disclosed on March 31st, and also whether Defendants accept the most recent set of deposition dates that have been offered for the Stratus authors. Please let me know Defendants' position on these issues either via email or when we talk at 11:00 Central.

In an effort to help the parties get past our current disagreement, I am attaching a chart which lists the "lead authors" for the various sections of the Stratus report.

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